

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 14, 2009 Session

THOMAS L. BAINES v. LUDMILA K. BAINES

Direct Appeal from the Circuit Court for McMinn County
No. 26923 Hon. Lawrence H. Puckett, Judge

No. E2009-00180-COA-R3-CV - FILED NOVEMBER 13, 2009

In this divorce action the Trial Judge divorced the parties and enforced an Affidavit of Support executed by the husband as a part of the wife's application for permanent residency in the United States, and also ordered the husband to continue the wife's health insurance through COBRA for a period of no less than eighteen months and no longer than thirty-six months. On appeal we affirm the Judgment of the Trial Court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and JOHN W. MCCLARTY, J., joined.

D. Mitchell Bryant, Athens, Tennessee, for appellant.

Jennifer L. Chadwell, Oak Ridge, Tennessee, for appellee.

OPINION

This divorce action was filed on September 1, 2006 by the plaintiff/appellant Thomas Baines. Defendant/appellee, Ludmila Baines (Mrs. Baines or wife), answered the complaint and filed a counter-complaint, and as part of the counter-complaint she alleged that Mr. Baines had executed an Affidavit of Support as part of her application for United States citizenship and that he was obligated to provide support to her by the terms of the affidavit. Further, that he had cancelled her medial insurance and she asked for an injunction causing Mr. Baines to reinstated her insurance

coverage. Mr. Baines answered the counter-complaint, denying that he was obligated to support Mrs. Baines by the terms of the immigration affidavit.

The case was heard by the Trial Judge on November 18, 2008 and in the opening statements by the attorneys, Mrs. Baines' attorney characterized the Affidavit of Support as the "main issue" before the Court.

The Trial Court found that sufficient grounds existed for both parties to be granted a divorce and property awards were made. The division of property is not an issue on appeal. Of import to this appeal is the Trial Court's finding that the husband had executed an Affidavit of Support pursuant to Section 213A of the Immigration and Nationality Act (INA) as part of the wife's application for permanent residency in the United States on March 3, 2003. The Court concluded that by signing the affidavit, the husband became obligated to financially support the wife at 125% of the poverty guidelines each year until either (1) Wife dies; (2) Husband dies; (3) Wife permanently departs the United States; (4) Wife is credited with 40 qualifying quarters of work; or (5) Wife becomes a United States citizen. The Trial Court then noted that none of these factors had been met, although the husband had not financially supported the wife since November 29, 2006.

The Trial Court ruled that the husband owed support to the wife pursuant to the affidavit in the amount of \$25,299.04 from November 29, 2006 to November 17, 2008 and that the wife was entitled to specific performance of the agreement contained in the affidavit. Additionally, pursuant to the terms of the Affidavit of Support, the wife was entitled to one-half of her attorneys fees from the husband, which were \$5,821.12. She was not awarded any alimony, and the Court held that the husband was to provide health insurance to the wife under "the current policy through COBRA for a period of either 18 months or 36 months dependent upon the specific term allowed under his policy." The Judgment further provided that the wife "shall apply for her United States Citizenship and shall further seek gainful employment."

The husband filed a notice of appeal, and raised these issues:

- A. Was the Trial Court correct when it held that the contractual obligation of support pursuant to the affidavit of support was enforceable and that appellant owed past and continuing support to appellee?
- B. Was the Trial Court correct when it required appellant to provide medical insurance to appellee under COBRA when the parties had TRICARE military insurance?

A Trial Court's findings of fact in a non-jury trial are reviewed *de novo* upon the record, and the findings are afforded a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13 (d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). Trial courts' conclusions of law are reviewed under a purely *do novo* standard with no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

Appellant contends the Trial Court erred when it enforced the support obligation undertaken by Mr. Baines when he signed the Form I-864 Affidavit of Support. We have not been cited, nor have we found any Tennessee authority dealing with this issue. Our research reveals that courts in other jurisdictions have considered whether a spouse can enforce an Affidavit of Support as part of a divorce case and have concluded that such action is appropriate.

The Federal District Court for the Northern District of California, in *Shumye v. Felleke*, 555 F. Supp.2d 1020, 1022 -1024 (N. D. Cal. 2008), succinctly set out the purpose of the Affidavit of Support and discussed its enforceability as follows:¹

Certain classes of immigrants may be deemed inadmissible including but not limited to, those that may be likely to become a public charge. *See* 8 U.S.C. § 1182(a)(4). Family-sponsored immigrants seeking admission are admissible only if the person petitioning for the immigrants' admission signs an Affidavit of Support Form I-864. A Form I-864 is a legally enforceable contract between the sponsor and both the United States Government and the sponsored immigrant. *See Schwartz v. Schwartz*, 2005 WL 1242171 at *1 . . . (W. D. Okla. May 10, 2005). The signing sponsor submits himself to the personal jurisdiction of any court of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce the Form I-864. *See* 8 U.S.C. § 1182(a).

The express terms of the Form I-864 state that by signing the Form I-864, the sponsor is obligated to provide the sponsored immigrant with whatever support is necessary to maintain the sponsored immigrant at an annual income that is at least 125% of the federal poverty level annual guideline. By signing a Form I-864 the “sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable.” 8 U.S.C. § 1183a(1)(A). Federal courts have consistently found that a Form I-864 constitutes a legally binding and enforceable contract between sponsor and a sponsored immigrant. *Cheshire v. Cheshire*, 2006 WL 1208010 at *5 . . . (M. D. Fla. May 4, 2006). The terms of the Form I-864 provide for the appropriate “measure of damages that would put plaintiff in as good a position as she would have been had the contract been performed.” *Stump v. Stump*, 2005 WL 1290658 at *11 . . . (N. D. Ind. May 27, 2005). A sponsor may also be held liable for legal fees and other costs of collection. *See* 8 U.S.C. § 1183a(c).

The sponsor's obligation under Form I-864 terminates only if one of five conditions

¹ The plaintiff and defendant in *Sjumye* were former spouses who had been divorced before the wife sought to enforce the support obligations of the Affidavit of Support.

is met: (1) the sponsor dies, (2) the sponsored immigrant dies, (3) the sponsored immigrant becomes a U.S. citizen, (4) the sponsored immigrant permanently departs the U.S., or (5) the sponsored immigrant is credited with 40 qualifying quarters of work. *See* 8 U.S.C. § 1183a(a)(2). Divorce is not a condition under which the sponsor's obligations under Form I-864 can be terminated. *See Schwartz*, 2005 WL 1242171 at *1.

Shumye at 1022 -1024.

Under the INA, the signing sponsor submits himself to the personal jurisdiction of any court of the United States or of any State . . . if the court has subject matter jurisdiction of a civil lawsuit to enforce the Form I-864. *See* 8 U.S.C. § 1182(a). Based on this provision of the INA, several state courts have concluded that they had jurisdiction to consider a claim for enforcement of an Affidavit of Support within the context of an underlying divorce action. *See Naik v. Naik*, 399 N. J. Super. 390, 944 A.2d 713, 717 (N. J. Super. A. D. 2008); *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344 at * 4 (Ohio App. 6 Dist. 2004); and *In re Marriage of Sandhu*, 41 Kan. App.2d 975, 978, 207 P.3d 1067, 1071 (Kan. App. 2009)(Citing *Moody v. Sorokina*, 40 A.D.3d 14, 18-19, 830 N.Y.S.2d 399 (2007)).

We hold that the Trial Court had subject matter jurisdiction over the contractual claim that was made in Mrs. Baines' counter-complaint to the complaint of divorce. Further, appellant never questioned the subject matter jurisdiction of the Trial Court below or on appeal.

The fact that Mr. Baines signed the Affidavit of Support is not at issue. The pertinent parts of the agreement are as follows:

I submit this affidavit of support in consideration of the sponsored immigrant(s) not being found inadmissible to the United States under section 212(a)(4)(C) . . . and to enable the sponsored immigrant(s) to overcome this ground of inadmissibility. I agree to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines. I understand that my obligation will continue until my death or the sponsored immigrant(s) have become U.S. citizens, can be credited with 40 quarters of work, depart the United States permanently, or die.

* * * *

I acknowledge that section 213A(a)(1)(B) of the Act grants the sponsored immigrant(s) and any Federal State, local or private agency that pays any means-

tested public benefit to or on behalf of the sponsored immigrant(s) standing to sue me for failing to meet my obligations under this affidavit of support. I agree to submit to the personal jurisdiction of any court of the United States or of any State, territory, possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce this affidavit of support.

* * * *

I acknowledge that a plaintiff may seek specific performance of my support obligation. . . . I may also be held liable for costs of collection, including attorney fees.

Form I-864, Part 7.

Mr. Baines certified that he knew the contents of the affidavit which he signed and that he made the “affidavit of support for the consideration stated in Part 7, freely, and without any mental reservation or purpose of evasion. (Form I-864, Part 7.

The applicable provisions of 8 U.S.C. § 1183a are:

(a) Enforceability

(1) Terms of affidavit

No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract--

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e) of this section), consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2) of this section.

(2) Period of enforceability

An affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or, if earlier, the termination date provided under paragraph (3).

(3) Termination of period of enforceability upon completion of required period of employment, etc.

(A) In general

An affidavit of support is not enforceable after such time as the alien (i) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A § 401 et seq.] or can be credited with such qualifying quarters as provided under subparagraph (B), and (ii) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

(c) Remedies

Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in section 3201, 3203, 3204, or 3205 of Title 28, as well as an order for specific performance and payment of legal fees and other costs of collection, and include corresponding remedies available under State law. A Federal agency may seek to collect amounts owed under this section in accordance with the provisions of subchapter II of chapter 37 of Title 31.

(e) Jurisdiction

An action to enforce an affidavit of support executed under subsection (a) of this section may be brought against the sponsor in any appropriate court--

(1) by a sponsored alien, with respect to financial support; or

(2) by the appropriate entity of the Federal Government, a State or any political subdivision of a State, or by any other nongovernmental entity under subsection (b)(2) of this section, with respect to reimbursement.

8 U.S.C.A. § 1183a.

Mr. Baines contends that only if Mrs. Baines, as the sponsored immigrant, had received means-tested public benefits could she and/or the Federal, State, or local or private entity which paid the benefits have a right of action against him, the sponsor, for reimbursement of those benefits. This contention is inconsistent with the clear language of 8 U.S.C. § 1183a (a)(A) which provides that the sponsor agrees to provide support to the sponsored alien and that the agreement to support is legally enforceable against the sponsor by the sponsored alien. Mr. Baines' contention is also inconsistent with the declaration Mr. Baines made as part of the affidavit that he acknowledged the Act grants the sponsored immigrant ". . . standing to sue him for failing to meet my obligations under this affidavit of support." Mr. Baines admitted that he had not provided any support to Mrs. Baines since November 2006, and that he had not fulfilled the obligation of support he had assumed under the contract/affidavit. In this connection *see Schwartz v. Schwartz*, No. CIV-04-770-M, 2005 WL 1242171 at *1 (W.D. Okla. 2005)(public benefits need not have been received by sponsored immigrant before suit for support is filed).

Pursuant to the contract/affidavit, the INA and case law, the Trial Court did not err when it awarded Mrs. Baines past support and specific performance for future support. We note that this ruling of the Trial Court was based on the contract entered into by Mr. Baines and was not an award of spousal support pursuant to Tenn. Code Ann. §36-5-101.

Next, Mr. Baines argues that the contract at issue is unenforceable as it lacks consideration because Mr. Baines did not receive anything of value in exchange for his agreement to support his wife. This argument is without merit. The terms of the affidavit Mr. Baines signed and certified that he understood provided that he submitted the Affidavit of Support in consideration of his wife not being found inadmissible to the United States . . . and to enable her to overcome this ground of inadmissibility. At the time the affidavit was signed Mr. and Mrs. Baines were married, living together and he had an interest in Mrs. Baines obtaining legal and permanent residence in the United States and in her not being deported, thus he agreed to be her financial sponsor and signed the affidavit.

Mr. Baines also argues that the contract should not have been enforced by the Trial Court because it was unconscionable. He presents some examples of why the contract is unconscionable and, thus, unenforceable. He contends that he had no choice but to sign the Affidavit because Mrs. Baines insisted that he sponsor her for citizenship. The record does not support this contention. In fact, it conflicts with Mrs. Baines testimony. He also contends that he had to sign the

Affidavit of Support if he wanted to stay married and that if he had refused to sign it, his wife would have divorced him. He further argues on appeal that he thought Mrs. Baines would receive citizenship within two years of his agreeing to be her sponsor. Again, there is no support in the record for these contentions. He also argues that “it is simply unconscionable to think a gentleman such as Mr. Baines, a 73 year-old disabled Military Retiree, could be burdened for the rest of his life with paying support to a person to whom he was married for a short period of time.” On this point, the Trial Judge did order Mrs. Baines to seek employment and to apply for her citizenship. If she is able to obtain citizenship or work for a certain period of time, Mr. Baines’s obligations under the contract terminates.

The question of whether a contract is unconscionable is a question of law. *Taylor v. Butler*, 142 S.W.3d 277, 284 - 285 (Tenn.,2004). The Tennessee Supreme Court, in *Taylor*, discussed the factors examined by a court to determine whether a particular contract is unconscionable. First, the court must look at the contract in the context of the time in which it was made and if it is unconscionable at the time the contract is made, a court may refuse to enforce the contract. *Id.* at 285(citing Restatement (Second) of Contracts § 208 (1981)). “The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes....” *Id.* Enforcement of a contract is generally refused on grounds of unconscionability where the “inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.” *Id.* (citing *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App.1984)). An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. *Id.*

If this contract is considered in the context of the time in which it was made, it was reasonable that in March 2003, some months after the marriage, Mr. Baines would be willing to support his new wife and assist her in obtaining her permanent residency and eventually citizenship. In fact, at that time the affidavit only required Mr. Baines to do what he was already doing, financially supporting his wife. Mrs. Baines testified that Mr. Baines never wanted her to work outside the home during their marriage, and he obviously planned to support her whether he signed the Affidavit of Support or not. Moreover, Mr. Baines was not rushed into signing the Affidavit of Support. The evidence showed that the couple married on September 10, 2002 and the first of the two Affidavits of Support was executed in March 2003. The second Affidavit of Support was signed in June 2004.

Mr. Baines’ testimony shows that he was actively involved in his wife’s immigration concerns. He drove her to the INS offices in Memphis and in Nashville, he drove her to her immigration attorney’s office in Knoxville, and he himself met with the immigration attorney to sign the affidavit. These actions demonstrate that Mr. Baines was not a coerced, involuntary or reluctant

actor in the immigration application process. Further, he does not quote any case that has found that Form I-864 Affidavit of Support, which presumably has been signed by many sponsors, has been found to be unconscionable by any court.

We hold that the action taken by Mr. Baines at the time he signed the agreement was reasonable under the circumstances, and he had a duty to read the terms of the agreement and he certified that he understood the terms. *See Giles v. Allstate Ins. Co.*, 871 S.W.2d 154 (Tenn. Ct. App.1993). We reject Mr. Baines' argument that the agreement was so unconscionable as to be unenforceable.

Mr. Baines had TRICARE health insurance coverage as a military retiree. Mrs. Baines, as his wife, also had coverage with TRICARE, but it was the parties understanding that her coverage would terminate at the time the divorce was granted. The Trial Court ordered Mr. Baines to "maintain health insurance for Mrs. Baines through COBRA" for a period of no less than eighteen months and no longer than thirty-six months pursuant to his policy through the United States Military. On appeal, Mr. Baines argues his policy will not permit him to continue his wife's coverage, thus the Trial Court's ruling was in error. As he did not raise this issue at trial and, pursuant to Tenn. R. App. P. 24 (g), he cannot raise the issue on appeal. *Jordan v. Jordan*, No. W2002-00854-COA-R3-CV, 2003 WL 1092877 at *8 (Tenn. Ct. App. Feb. 19, 2003)(citing *Lovell v. Metro. Gov't.*, 696 S.W.2d 2 (Tenn.1985); *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn.1983)).

The Judgment of the Trial Court enforcing the Affidavit of Support and ordering past support and specific performance of contract is affirmed, and the Order of the Trial Court regarding the provision of health care by Mr. Baines to Mrs. Baines through COBRA is also affirmed.

The cost of the cause is assessed to Thomas L. Baines.

HERSCHEL PICKENS FRANKS, P.J.